United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18708

ROBERT F. BELL,

Appellant,

v.

SAM A. ANDERSON, Superintendent,
D. C. Jail, and

UNITED STATES OF AMERICA,

Appellees

841

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND AN ORDER OF THAT COURT DENYING A PETITION FOR WRIT OF HABEAS CORPUS

United States Court of Appeals
for the District of Columbia Circuit

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Appointed by this Court

STATEMENT OF QUESTION PRESENTED

The question is whether the judgment of the Court below, and the plea of guilty to the lesser included offense of attempted robbery under count 2 of the indictment, should be vacated, and the indictment dismissed as to that offense (the balance of the indictment having already been dismissed), because the Appellant was subjected to arbitrary, purposeful, oppressive or vexatious delay which constitutes in law, as well as in fact, a violation of his Constitutional right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution as a result of successive postponements of his trial date from May 28, 1963, to December 12, 1963, a period of 198 days (and 268 days from date of arrest and 248 days from indictment), during which Appellant moved *pro se* for dismissal of the indictment due to denial of a speedy trial, which position was not waived in the circumstances of this case by the plea of guilty to such lesser included offense.

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BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This case is before this Court on direct appeal from a judgment of the United States District Court for the District of Columbia (the Honorable Burnita Shelton Matthews, Judge) entered February 7, 1964, sentencing Appellant to from one (1) to three (3) years imprisonment on a plea of guilty to the lesser included offense of attempted robbery pursuant to §22-2902 District of Columbia Code (1961 Ed.) under the second count of a three-count indictment (for housebreaking, robbery and possession of a prohibited weapon) the balance of which indictment was dismissed. This Court ordered (October 30, 1964) that a pro se document labelled by the appellant a petition for writ of habeas corpus be treated as a notice of appeal and that this appeal shall be considered as an appeal from the order of said District Court (the Honorable Richmond B. Keech, Judge) entered March 10, 1964, denying petition for writ of habeas corpus, and as said direct appeal.

Appellant was granted leave to prosecute his appeal in

forma pauperis by this Court by an order entered on May 8, 1964. The undersigned was by that order appointed to represent the Appellant in this case.

Under 28 U.S.C. §2253 and 28 U.S.C. §1291 this Court has jurisdiction to determine the question presented.

STATEMENT OF THE CASE

Appellant Robert F. Bell was arrested in New York City, on March 19, 1963, on charges of housebreaking, robbery and possession of a prohibited weapon, the alleged offenses having occurred on February 11, 1963, in the District of Columbia. On April 8, 1963, an indictment covering those alleged offenses was filed in Criminal Case No. 326-63 against him and a co-defendant. At his arraignment on May 10, 1963, Appellant pleaded not guilty, and trial was scheduled for May 28, 1963.

A series of continuances resulted in prolonged postponement of the trial date for a period of 198 days (see jacket entries and docket): On May 23, 1963, the Government requested that the case be continued until June 26, or a period of 29 days. The reason for this continuance

does not appear. The Court-appointed counsel for the Appellant concurred in this request, but the Appellant himself did not know about the request or his counsel's consent (see Petitioner's Reply to Government's Opposition to Petition for Leave to Prosecute an Appeal without prepayment of Costs, April 20, 1963, p.1). On May 31, 1963, the Appellant filed a letter in the nature of a motion for reduction in bail (see Docket in Case No. 326-63, May 31, 1963). When no action was taken on this letter, Defense counsel requested a continuance of three weeks in order to file proper motions. A continuance was granted until July 19, 1963, or for a period of 23 days. On July 12, 1963, co-defendant filed a motion for a mental examination. This motion was granted, and the case continued until November 7, 1963, or a period of 111 days. Meanwhile, Appellant's motion for reduction of bond was argued and granted (see Order of July 26, 1963). But even the reduced bond of $2,000 could not be met by him. On October 15, 1963, the Appellant filed <u>pro se</u> a motion for dismissal of indictment due to a denial of his Constitutional right to a speedy trial (see Motion of October 15, 1963). This motion was heard and was denied on

October 30, 1963 (see Order of October 30, 1963). The trial date remained set for the following November 7. All the Criminal Courts were in trial on November 7. The case again was continued, this time by the Court, until December 5, or a period of 28 days. On December 3, the Government requested a continuance of one week, to December 12, 1963, because a police officer in the case was out of town and would be until that date. Finally on December 12, 1963, the case came on for trial, 58 days after the Appellant's motion that implicitly asked for a speedy trial.

When the case came on for trial on December 12, 1963, the Appellant and his co-defendant, on the promise by the Government to dismiss the balance of the original indictment, and without the right to a speedy trial and the Appellant's assertion thereof being recognized, withdrew their pleas of not guilty and each pleaded guilty to the lesser included charge of attempted robbery under the second count of the indictment (see Tr. of December 12, 1963, ps. 4 and 5). Thereafter, on February 7, 1964, Appellant was sentenced to from 1 to 3 years for attempted

robbery, the other charges being dismissed on motion of the Government (see Tr. of February 7, 1964, p.9).

Appellant promptly and <u>pro se</u> initiated proceedings in the District Court. On February 14, 1964, well within the 10 day period provided for appeal by Rule 37(a) (2) of the Federal Rules of Criminal Procedure, he filed <u>pro se</u> a document, mis-labelled petition for writ of habeas corpus, in which he alleged that a speedy trial had been unconstitutionally denied him during the earlier proceedings outlined above. By order entered March 10, 1964, the District Court denied this petition as a petition for writ of habeas corpus. This Court, however, as stated above granted by order entered May 8, 1964, Appellant's petition for leave to prosecute, without prepayment of costs, an appeal from the lower Court's denial.

On Appellant's motion to remand the case to the United States District Court for the District of Columbia with directions relating to treatment of the aforesaid mis-labelled document as a timely filed notice of appeal, with counsel for the Appellees agreeing it should be so

treated, this Court on October 30, 1964, ordered that such document be treated as a notice of appeal and "that this appeal shall be considered as an appeal from the order denying appellant's petition for writ of habeas corpus and as a direct appeal from Criminal Case No. 326-63."

CONSTITUTIONAL PROVISION INVOLVED

Appellant had a right to a speedy trial under the Sixth Amendment to the United States Constitution, which reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committeed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF POINTS

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1. The Court below erred in the implementation of

an affirmative duty to afford Appellant a speedy trial, by failing to place Appellant's case on the criminal calendar on a day-to-day basis after Appellant had once asserted his right to a speedy trial by a motion to dismiss the indictment on the ground that he had been denied a speedy trial, or by taking other practicable action to afford Appellant a speedy trial.

2. The Court below erred in failing to dismiss the indictment after Appellant had spent 198 days from arraignment (268 days from arrest and 248 days from indictment) and 58 days from assertion of his right to a speedy trial before he was brought to trial, and in the circumstances of this case the plea of guilty to a lesser included offense under the second count of the indictment did not waive the right of the Appellant to a speedy trial and to his freedom for denial of that right.

SUMMARY OF ARGUMENT

I

A. To come on for trial 268 days after arrest, 248 days an affirmative duty to afford Appellant a speedy trial, by failing to place Appellant's case on the criminal calendar [illegible] case. [illegible] right [illegible] trial [illegible] dis- [illegible] had been [illegible] a speedy trial [illegible] protection [illegible] to [illegible] speedy trial.

2. The Court below [illegible] to dismiss the indictment [illegible] 136 days from arraignment (288 days from arrest and 245 days [illegible] indictment) and 38 days from assertion of his right [illegible] speedy trial before he was brought [illegible] trial. [illegible] the circumstances of this case the [illegible] included [illegible] waive the right [illegible] did not [illegible] speedy trial and to his freedom for [illegible] that right.

SUMMARY OF ARGUMENT

I

1. To come to trial 136 days after arrest, 248 days [illegible]

after indictment and 198 days after the date first set for trial is not "speedy" in the ordinary meaning of the English language. Nor is it, in the circumstances of this case, a fulfillment of the right to a speedy trial which the Sixth Amendment to the Constitution states that the accused shall enjoy in all criminal prosecutions; That is so because, although the ancient right to a speedy trial which has been jealously guarded over the centuries is necessarily relative, is consistent with delays, depends on circumstances, and does not preclude the right of public justice, it is denied where there is substantial delay for which the accused was not responsible and where the accused asserted his right to a speedy trial. In those circumstances, which obtained in this case, the delay amounted in law to such oppressive, purposeful, vexatious, or arbitrary delay as constituted a deprivation of the Appellant's Constitutional right to a speedy trial.

B. Regardless of whether there had been a deprivation of such right when the Appellant asserted it by _pro se_ motion for dismissal of the indictment on the ground that he had

not been granted a speedy trial, the Court below then had a duty to take the necessary steps to see, especially as the Appellant was in jail, that the trial occur as promptly thereafter as an opening on the calendar would permit. That the Court below did not do, but allowed further substantial delay not attributable to the Appellant, which denied and breached his right to a speedy trial.

II

When finally the Appellant came on for trial after the long delays which had occurred and after 58 days from the filing and 43 days from the denial of his motion asserting his right to a speedy trial, during all of which time, the Appellant had been in jail because he was unable, on account of his poverty, to meet the $2,000 bond set for bail, he had, and he still has, in the circumstances of this case, the right to be set free for denial of a speedy trial. He did not waive that right, which right was not then recognized, by withdrawing his original plea of not guilty and consenting to the entry of a plea of guilty to the lesser included offense of attempted robbery

under the second count of a three count indictment for house-breaking, robbery, and possession of a prohibited weapon, the balance of which indictment was dismissed, all pursuant to an arrangement made by the Prosecutor.

III

Although the Order herein of October 30, 1964, provides that this appeal should be considered as an appeal from the order denying Appellant's petition for writ of habeas corpus it is believed that so considering this appeal leads immediately to difficulties and doubts as to the habeas corpus jurisdiction in view of the provisions of §2255 of Title 28 of the United States Code. Dealing with the case on direct appeal avoids those doubts and difficulties and the possibility of a procedural snarl in which there is no need for the Court to become involved. However, whatever route is taken the judgment and plea in Criminal Case No. 326-63 should be vacated and the remaining portion of the indictment therein dismissed on the ground that the Appellant was denied a speedy trial.

ARGUMENT*

I

THE DELAY WHICH OCCURRED WAS SUCH AS TO DEPRIVE THE APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL, AND THE COURT BELOW FAILED IN ITS AFFIRMATIVE DUTY TO AFFORD APPELLANT A SPEEDY TRIAL, ESPECIALLY AFTER HE HAD ASSERTED HIS RIGHT THERETO.

A. The Delay was substantial.

The United States Constitution provides in the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy.... trial,....".

In this case the Appellant certainly did not, in the ordinary meaning of the English language, "enjoy the right to a speedy" trial. There was no speed in his coming on for trial 268 days from the date of his arrest, 248 days from the date of his indictment and 198 days from the date that was first set for his trial.

As the Supreme Court has said, however, as to that provision of the Sixth Amendment, this right to a speedy trial is "necessarily relative" and "is consistent with delays and depends upon circumstances. It secures

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*Grateful acknowledgment is made of effective assistance rendered by the Criminal Law Research Organization of the School of Law of the University of Virginia in performing some of the research on which this brief is based.

rights to a defendant. It does not preclude the right of public justice." *Beavers v. Haubert*, (1905) 198 U.S. 77, 87. These principles have been recognized by other Federal Courts, see e.g., *Kong v. United States*, (9th Cir.,1954) 216 F2d 665, 667; *Bullock v. United States*, (6th Cir. 1959) 265 F2d 683, 695, *cert*. *den*. 360 U.S. 909, *rehear*. *den*. 361 U.S. 855, including this Court in a recent decision -- see *Stevenson v. United States*, (1960) 107 App. D.C. 398, 278 F2d 278.

"The right to a speedy trial is of long standing and has been jealously guarded over the centuries." *Petition of Provoo*, (1955) 17 F.R.D. 183, 196, *aff'd* *mem*. *sub* *nom*. *United States v. Provoo*, 350 U.S. 857. It has been construed to require reasonable dispatch, and not a trial immediately after return of an indictment, *Shepherd v. United States*, (8th Cir., 1942) 163 F2d 974, 976, and to prevent oppression of citizens by dilatory action on the part of the prosecution. *Ibid* p.976. The delay must be unreasonable and must not have been due to the defendant's actions. *United States v. Lustman*, (2d Cir. 1958) 258 F2d 475, 477, *cert*. *den*. 358 U.S. 880

This Court is one of its latest decisions has had

rights to a defendant. It does not preclude the right of public justice." Beavers v. Haubert, (1905) 198 U.S. 77, 87. These principles have been recognized by other Federal Courts, see e.g., Kong v. United States, (9th Cir.,1954) 216 F2d 665, 667; Bullock v. United States, (6th Cir. 1959) 265 F2d 683, 695, cert. den. 360 U.S. 909, rehear. den. 361 U.S. 855, including this Court in a recent decision -- see Stevenson v. United States, (1960) 107 App. D.C. 398, 278 F2d 278.

"The right to a speedy trial is of long standing and has been jealously guarded over the centuries." Petition of Provoo, (1955) 17 F.R.D. 183, 196, aff'd mem. sub nom. United States v. Provoo, 350 U.S. 857. It has been construed to require reasonable dispatch, and not a trial immediately after return of an indictment, Shepherd v. United States, (8th Cir., 1942) 163 F2d 974, 976, and to prevent oppression of citizens by dilatory action on the part of the prosecution. Ibid p.976. The delay must be unreasonable and must not have been due to the defendant's actions. United States v. Lustman, (2d Cir. 1958) 258 F2d 475, 477, cert. den. 358 U.S. 880

This Court is one of its latest decisions has had

occasion to review this question. See, e.g., King v. United States, (1959) 105 App. D.C. 193, 265 F2d 567, cert. den. 359 U.S. 998; Nickens v. United States, (1963) 116 App. D.C., 338, 323 F2d 808; Smith v. United States, (1964) ___ App. D.C. ___, 331 F2d 784; Marshall v. United States, (No. 18047, June 30, 1964) ___ App. D.C. ___, ___ F2d ___.

In the Smith case, supra, this Court said in effect that the delay, to constitute deprivation of the right to a speedy trial, must be "arbitrary, purposeful, oppressive or vexatious".

The situation in the case here before the Court is similar to that in the Smith case as characterized by Senior Circuit Judge Edgerton in his panel opinion in that case, which is set forth in full in the dissenting opinion in the Smith case as to the speedy trial point, by Circuit Judge Wright with whom Chief Judge Bazelon concurred. Judge Edgerton said (p. 795) "In our opinion the right to a speedy trial includes, in the circumstances of this case, a right not to be kept in jail for months without trial for the convenience of the prosecution",

and it is submitted that the same is true where the delay is caused by a combination of crowded criminal calendar and absence of a police officer. Judge Edgerton went on to say "We think this right may not be denied because the accused is poor". Clearly the Appellant had to remain in jail only because he was so poor he could not meet a $2,000 bond.

B The Appellant Was Not Responsible for the Delay.

As to the view indicated in some cases that the delay must not have been due to the defendant's actions, e.g., Fouts v. United States, (6th Cir. 1958) 253 F2d 215, 258 F2d 402, cert. den., 358 U.S. 884, in this case a mere 23 days in June and July, 1963, of the total period of delay were caused by the Appellant himself, and that only because a letter filed by the Appellant pro se in the nature of a motion to reduce bail was neglected by the authorities so that the then defense counsel had to file a proper motion. All other postponements, a total of 175 of the 198 days after arraignment, are attributable to the Government, the co-defendant, and the court calendar, and all postponements after the Appellant had asserted his

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right to a speedy trial by pro se motion were attributable to crowded court calendar and absence of a police officer, and should not be considered as dilatory action for which Appellant is responsible.

C. The Appellant Asserted His Right, but the Court Below Failed to Take Effective Action.

The Courts have uniformly stated the necessity of a defendant asserting his right to a speedy trial. See Sherpherd v. United States, supra, in which the court said: "He must assert the right if he wishes its protection and if he does not make a demand for trial or resist a continuance of the case, or if he goes to trial without objection that the time limit has passed, or fails to make some kind of effort to secure a speedy trial, he will not ordinarily be in a position to demand dismissal because of delay in prosecution...".

Here the Appellant did assert his right to a speedy trial by a motion pro se for dismissal of the indictment based on the denial of his right to a speedy trial. This Court in its above cited decision in Smith v. United States has considered (p. 788) such a motion to be an

adequate assertion of the right to a speedy trial.

But instead of putting the case on a day-to-day basis as was done in the Smith case, and regarded by this Court as a proper procedure (Marshall v. United States, supra, slip, p.10, Judge Washington concurring), or taking some other practicable action to afford a prompt trial, the District Court let slip away another 58 days from filing, and 43 days from denial, of the Appellant's motion, entirely due to the Government or the Court calendar, with the Appellant languishing in jail until he finally was able to appear in court for trial.

The District Court is required by Rule 50 of the Federal Rules of Criminal Procedure, as pointed out by Judge Washington in the Marshall case, supra, (slip p.9), to give preference to criminal proceedings. The Rule prescribes preference "as far as practicable". Although it has been held by this Court in the King case, supra, (p.195, 569), that "A method of disposition which reasonably accommodates practicalities is not illegal", a court calendar congestion resulting in a further postponement of trial for a man presumed innocent, and incarcerated awaiting

his trial because of his incapability to meet a bond, should not be considered as a legal and just delay within the scope of the right to a speedy trial, where every practicable step such as placing his case on a day-to-day basis, to afford him a speedy trial, has not been taken.

In his dissent in the <u>King</u> case, then Circuit Judge Bazelon, with whom Circuit Judges Edgerton, Fahy and Washington joined, said in connection with the calendar system of the Court below discussed in that case (p.198; 572):

> "It appears clear to me that appellant was not brought to trial in a manner consistent with Rule 50. The requirement of that Rule for preference for criminal proceedings applies to specific cases as well as to the docket in general. Indeed the preference cannot be made effective except in specific cases. Here the appellant was in jail, as if serving sentence, though not tried and though presumed to be innocent until convicted. He was not free on bail bond.[4] The system accordingly operated to the prejudice of appellant by depriving him of liberty for substantial periods of time, not because of guilt but because of the system, and without either representation by counsel or appearance <u>pro so</u> in connection with the continuances."

Footnote 4 referred to in the paragraph just quoted reads:

> "4. We are informed the system we have described has been discarded in respect of prisoners in

> this situation and is no longer applied to them. We have been informed that, since May 5, 1958, any such case that is called on the criminal daily assignment calendar and marked "Ready" is carried from day to day till reached for trial or otherwise disposed of."

The "new" practice stated in the footnote does not seem to have been followed in this case.

In that dissent, supported by three Judges as stated, now Chief Judge Bazelon said (p.199; 573): "Even if no agency or instrumentality of the Government is responsible for the delay, when there has in fact been a substantial delay not of the Defendant's own choosing ... there has in law been a denial of a speedy trial." This view seems to be shared by other members of this Court, see, e.g., dissent of Judge Fahy in Askins v. United States, (1957) 97 App. D.C. 407, 413, 231 F2d 741, 746, and has found forceful expression by Judge Wright, with whom Chief Judge Bazelon concurred, in his dissent in the Smith case, supra (p.793), when he said: "In the twentieth century, with its automation, its computers, and its accent on action, everything seems to be getting speedier except criminal justice. And, undeniably, some of that lack of

speed results in great injustice."

D. <u>The Appellant Is Entitled to His Freedom</u>.

On the basis of the authorities discussed above and the importance of the Constitutional right to a speedy trial, it is submitted that a weighing of all the "circumstances" of this case as the Court is bound to do (see <u>Smith</u>, <u>supra</u>, p.789) leads to the conclusion that there was in law "such oppression or ... purposeful, vexatious or arbitrary action as amounts to a deprivation of the Appellant's Constitutional right to a speedy trial"; because there was protracted and unnecessary delay not attributable to the Appellant, the Appellant asserted his right to a speedy trial, and regardless of whether such right had then been denied, the Court below allowed further substantial delay not attributable to the Appellant which breached his right to a speedy trial. Accordingly, the judgment of the Court below and the plea of guilty to the lesser included offense should be vacated and the undismissed portion of the indictment relating to that offense dismissed, and the Appellant set free.

II

THE APPELLANT DID NOT WAIVE HIS RIGHT TO A SPEEDY TRIAL, AND TO HIS FREEDOM BECAUSE OF THE DENIAL OF THE RIGHT

Although he pleaded guilty to the lesser included offense of attempted robbery, Appellant has not waived his Constitutional right to a speedy trial, and to his freedom for denial thereof.

A plea of guilty, of course, generally has serious consequences in law, as the Supreme Court stated in the leading case of Kercheval v. United States, (1927) 274 U.S. 220, 223, saying: "A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive." It "admits all essential allegations, thus relieving the Government of the burden of making proof", and "constitutes an effective and complete waiver of all non-jurisdictional defects which might be otherwise raised by way of defense, appeal or collateral attack" -- United States v. Hetherington, (7th Cir. 1960) 279 F2d 792, 796, cert. den. 364 U.S. 908

But the plea of guilty here can not wipe out a denial

or breach of Constitutional right which had already occurred. Even if the right to a speedy trial is a privilege rather than a jurisdictional matter, Levine v. United States, (8th Cir. 1950) 182 F2d 556, 558; United States v. Sorrentino, (3rd Cir. 1949) 175 F2d 721, 722, cert. den. 338 U.S. 868, and can, therefore, be waived, Worthington v. United States, (7th Cir. 1924) 1 F2d 154, cert. den. 266 U.S. 626, it has to be considered by a Court, if it has been expressly asserted as Appellant did by his motion of October 15, 1963, and should not be ignored as it was in this case when it came on for trial on December 12, 1963.

In Pate v. United States, (8th Cir. 1961) 297 F2d 166, 167, cert. den. 370 U.S. 928 (1962) the Court held that "...it [i.e., the right to a speedy trial] was waived as a matter of law when Appellant chose to enter his plea of guilty without making assertion of it. It could not, in the circumstances, afford a basis for a collateral attack upon his judgment of conviction and sentence" [emphasis added]. That decision, however, is not controlling here,

nor would similar decisions be, because the question of the denial of a speedy trial was never raised at or before the plea of guilty.

This case, on the other hand, is quite similar to People v. Chirieleison, (N.Y. Ct. of App., 1957) 3 NY2d 170, 143 NE2d 914, in which the defendant was indicted in 1950 by a Kings County grand jury for the crime of robbery committed in June 1950, to which he pleaded not guilty, but shortly thereafter, by reason of a conviction in New York County was sentenced to the penitentiary for 5 years. After serving that sentence, he was returned in June, 1955, to the Kings County Court for trial on the 1950 charge. He moved in October of 1955, unsuccessfully, to dismiss the indictment on the ground of denial of a speedy trial. The New York Court of Appeals then decided People v. Prosser, (1955) 309 NY 358, 130 NE2d 891, in which it cited its decision in People ex rel. Battista v. Christian, 249 NY 314, 164 NE 111, wherein it had said that "personal rights may be waived but fundamental rights affecting public policy may not". The defendant then, on the basis of the Prosser case again moved unsuccessfully

for a dismissal, shortly after which he filed notice of appeal to the Appellate Division, which dismissed the appeal on the ground that the order was intermediate in nature and not appealable. Defendant then pleaded guilty to the crime of petit larceny and was sentenced, execution of the sentence being suspended. Thereupon he appealed from the order of conviction, bringing up for review the order of the Court denying his motion to dismiss the indictment, and the Appellate Division reversed the order, granted the motion, and dismissed the indictment on the ground that defendant had been denied his right to a speedy trial. In affirming the order of the Appellate Division dismissing the indictment, and over ruling the contention of the district attorney that defendant waived his right to trial by pleading guilty, and was not privileged to complain that he had not been brought to trial promptly, the New York Court of Appeals said that under other and different circumstances a plea might constitute a waiver of the right to a speedy trial, but that the mandate for a speedy

trial had been violated, the duty imposed upon the People breached, and that the defendant's subsequent plea of guilty could not be deemed a waiver.

The conclusions reached in the aforesaid decision of the New York Court ofAppeals should be applied to this case. It is true that generally a plea of guilty leads to the legal presumption that an accused has waived his personal rights and privileges secured by the Constitution. But applying such a waiver means only the Court has found that the accused has foregone the privilege to insist upon use of those rights; the rights themselves are in integral part of the Constitution and are not <u>necessarily</u> waived by a procedural step, because otherwise the Constitutional guarantees would be relegated to the same level as a simple statute or rule, and would even be in effect subject thereto. That would deny that laws have to be in accordance and consistent with the Constitution and subject to the Constitution. A plea of guilty as a possibility in criminal procedure to replace the conviction of an accused can, therefore, not destroy or eliminate the Constitutional

rights of the same accused, but can only give some evidence that he foregoes use of his legal rights to defend himself against the indictment. Independently of whether he is guilty or not, he nevertheless is entitled to his rights under the Constitution, including, of course, the right to a speedy trial.

Here the Appellant did not, as the Sixth Amendment to the Constitution provides, enjoy that right. On the contrary he was in jail for 268 days until his case finally came on for trial, because he was too poor to meet the $2,000 bond finally set, and he has remained in jail since December 12, 1963, despite his repeated assertions of his right to a speedy trial and to his freedom because of the denial of that right.

The circumstances of this case as a whole show that the Appellant did not intend to waive his right to dismissal of the indictment on account of denial of a speedy trial -- he immediately asserted it in the document which he promptly filed which has been treated as his notice of appeal. Recognizing, as this Court has, that

the Appellant is an untutored, indigent defendant, it is not reasonable to conclude that, having asserted his right to a speedy trial only a short time before and having reasserted it immediately thereafter, and the question of his assertion of speedy trial not having been mentioned at the time that the plea was entered, the Appellant intended by his plea to waive his Constitutional right to a speedy trial. It is only reasonable to conclude from the circumstances that the Appellant had no idea of any necessity of reasserting his right to a speedy trial at that time or that he would lose any rights by not doing so.

In this case, the public interest in the prosecution of crimes once committed that might lead to the legal presumption that the accused waived his right to a speedy trial should yield to the maintenance of the Constitutional guarantee, because it had already been asserted by an adequate motion, by which the Appellant had shown that he was conscious of his rights and wanted to use them. Even when and particularly because his motion was denied the Court had the affirmative duty imposed by the Constitution to procure the Appellant a speedy trial, especially since he remained in jail,see

King v. United States, supra, at 569; Smith v. United States, supra, at p.793, (dissent). The delay that occurred after the motion in connection with the time Appellant had already spent in jail violated the mandate for a speedy trial. The duty imposed upon the Court was breached, and Appellant's subsequent plea of guilty should not be deemed a waiver. In consideration of the foregoing, even without a further assertion of the right to a speedy trial, the Court below should have dismissed the indictment because the Appellant had not enjoyed the right to a speedy trial.

III

AS TO THIS APPEAL CONSIDERED AS AN APPEAL FROM THE ORDER DENYING APPELLANT'S PETITION FOR WRIT OF HABEAS CORPUS.

The basic question here presented, as stated at the outset, relates to speedy trial, regardless of what the procedural posture is in which the Court deals with that question. It is believed that there has been covered in the foregoing Points I and II of the Argument the substantive questions presented with regard to the right of

the Appellant to his freedom because of denial of a speedy trial.

It seems to Counsel for the Appellant that the proper procedural posture is the direct appeal from Criminal Case No. 326-63, and that attempting to deal with the case as an appeal from the order denying Appellant's petition for writ of habeas corpus leads to a procedural snarl in which there is no need for the Court to become involved.

The provisions of §2255 of Title 28 of the United States Code seem to preclude collateral attack on the judgment below by habeas corpus, so that habeas corpus appears to be an improper procedure for fulfilling Appellant's right to dismissal for lack of speedy trial -- see Paragraph 6, pages 5 - 7, of Motion for Remand with Directions filed herein September 25, 1964, for the Appellant. Further, as stated in such Paragraph 6, pages 7 - 8, such Counsel believes that it is doubtful that a §2255 motion would lie, because the question of speedy trial is involved on the record in said Case No. 326-63, and can

be said not to be a basis for collateral attack. Such Counsel, however, in said Motion, paragraph 6, pages 8 - 9, noted the statement of this Court in Jordan v. United States District Court for Dist. of Col., (1956) 98 App. D.C. 160 233 F2d 362, rev'd on other grounds, 352 U.S. 942, that "Although we have found no precedent to support the proposition, perhaps in an extreme case delay in bringing a prisoner to trial is subject to collateral attack." Such Counsel also noted that the 5th Circuit in its recent decision in Waugaman v. United States, (5th Cir., 1964) 331 F2d 189, with reference to a ground of attack for denial of a speedy trial where the delay was some 2-1/2 years between indictment and trial, said (p.191) that ground presented a serious charge of a character which goes "to the fundamental fairness of the proceeding" and is "therefore, within the scope and compass of §2255."

Counsel for the Appellant believes that considering this appeal as an appeal from the order denying Appellant's petition for writ of habeas corpus leads immediately to difficulties and doubts as to the habeas corpus jurisdiction in view of the provisions of §2255, and that

dealing with the case on direct appeal avoids those difficulties and doubts. However, whatever route is taken, the judgment and plea in Criminal Case No. 326-63 should be vacated and the remaining portion of the indictment therein dismissed on the ground that the Appellant was denied a speedy trial.

Dated: November 30, 1964

Respectfully submitted

E. Fontaine Brown

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Certificate as to Service

I hereby certify that I served a copy of the foregoing Brief for Appellant in No. 18708 upon the United States Attorney for the District of Columbia by mailing such copy to him this 30th day of November, 1964, addressed as follows:

Hon. David C. Acheson
United States Attorney
United States District Court House
Washington, D.C. 20001
Attn: John A. Terry, Esq.

E. Fontaine Brown

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Counsel for Appellant
(Appointed by this Court)

BRIEF FOR APPELLEES

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18708

ROBERT F. BELL, APPELLANT

v.

SAM A. ANDERSON, Superintendent, District of Columbia Jail,

and

UNITED STATES OF AMERICA, APPELLEES

Appeal from the United States District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit
FILED JAN 7 1965
Nathan J Paulson
CLERK

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
WILLIAM H. COLLINS, JR.,
JOHN A. TERRY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

Appellant, indicted in April 1963 for housebreaking, robbery, and possession of a prohibited weapon, pleaded guilty in December 1963 to attempted robbery as a lesser included offense under the second count of the indictment. At the time of his plea he admitted in open court that he had committed the offense to which the plea was entered; at the time of sentencing he repeated this admission and stated further that he knew that what he had done was a crime. He never denied his guilt and never sought to withdraw his plea. In the opinion of appellees the following questions are presented:

1. Under the foregoing circumstances, having entered a plea of guilty and waived his right to a trial, can appellant validly contend at this stage of the proceedings that he was denied his constitutional right to a speedy trial?
2. Is lack of a speedy trial a valid ground for collateral attack upon a conviction, particularly when that conviction is based on a plea of guilty?

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18708

ROBERT F. BELL, APPELLANT

v.

SAM A. ANDERSON, Superintendent, District of Columbia Jail,

and

UNITED STATES OF AMERICA, APPELLEES

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

In a three-count indictment filed April 8, 1963, Robert F. Bell and Lorenzo A. King were charged in Criminal Case No. 326-63 with housebreaking, robbery, and possession of a prohibited weapon (sawedoff shotgun), the third count naming Bell alone. After five continuances[1] the case was set for trial on December 12, 1963. On that date both defendants withdrew their pleas of not guilty previously entered and pleaded guilty to attempted robbery under count two of the indictment. At that time both defendants, by counsel, withdrew all pending motions[2] (P Tr. 7).[3] On February 7, 1964, each defendant received a sentence of from one to three years,[4] the maximum allow-

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[1] Trial was originally scheduled for May 28. On May 23 the Government requested that the case be continued until June 26; defense counsel concurred in this request. The reason for the continuance does not appear in the record. Thereafter the case was continued a further month until July 25 at the request of the defense. On July 12 Bell's co-defendant King filed a motion for a mental examination. The motion was granted, and the case was continued until November 7. All the criminal courts were in trial on November 7, and the case was accordingly continued by the court until December 5. On December 3 the Government requested a continuance of one week, from December 5 to December 12, because a police officer in the case was out of town and would be until that date. Finally, on December 12 both defendants pleaded guilty to a lesser included offense. It can thus be readily seen that of the five continuances totaling more than six months, only the first and the last, amounting to a little less than six weeks, are attributable to the Government.

[2] Appellant had filed on October 15, 1963, a motion *pro se* to dismiss the indictment for lack of a speedy trial. The motion was denied after a hearing on October 30. But see footnote 5, *infra.*

[3] The two transcripts herein will be cited in this brief by letter. "P Tr." refers to the transcript of the plea on December 12, 1963; "S Tr." refers to the transcript of the sentencing on February 7, 1964.

[4] King's sentence was split pursuant to the second paragraph of 18 U.S.C. § 3651, and he was sentenced to serve not

able under the statute (22 D.C. Code § 2902). A letter in the nature of a motion for credit for time served, filed by Bell on February 11, was heard and denied by the District Court on March 13.

Bell did not note an appeal from his conviction. Instead, on February 13, 1964, he filed in the District Court a petition for a writ of habeas corpus (H.C. No. 83-64), wherein he contended, *inter alia,* that he had been denied his constitutional right to a speedy trial. The court issued a rule to show cause, and appellee Anderson filed a return and answer thereto. On March 2 the court discharged the rule and dismissed the petition. Leave to appeal *in forma pauperis* from that dismissal was denied by the District Court on March 19 but granted by this Court on May 8, 1964, in Misc. No. 2293. The case was accordingly docketed as *Bell* v. *Anderson,* No. 18708.

Thereafter, on October 30, 1964, upon consideration of a series of pleadings filed by the parties, this Court entered an order providing—

> that appellant's aforesaid petition for writ of habeas corpus shall be treated as a notice of appeal and that this appeal shall be considered as an appeal from the order denying appellant's petition for writ of habeas corpus and as a direct appeal from Criminal Case No. 326-63.

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more than six months in jail and the remainder of his term on probation (S Tr. 9). Bell, however, did not receive a split sentence. The disparity may perhaps be explained by the fact that Bell had a lengthy criminal record whereas King had none. See P Tr. 7.

On November 19, 1964, this Court granted appellee's motion for joinder of the United States as an additional party and co-appellee. The case is thus now before this Court ~~in a dual posture,~~ both as an appeal from the dismissal of the habeas corpus petition ~~in H.C. No. 83-64~~ and as a direct appeal from appellant's conviction ~~in Criminal No. 326-63.~~

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTE INVOLVED

Title 22, District of Columbia Code, Section 2902, provides:

> Whoever attempts to commit robbery, as defined in section 22-2901, by an overt act, shall be imprisoned for not more than three years or be fined not more than five hundred dollars, or both.

SUMMARY OF ARGUMENT

By operation of law appellant waived his right to a speedy trial when he entered his plea of guilty. Such a plea is a complete waiver of all non-jurisdictional defects and all defenses, known and unknown. The right to a speedy trial, although a constitutional right, is not jurisdictional and thus can be waived. Moreover, it is deemed to be automatically waived unless it is promptly asserted by the accused. Appellant's October 15 motion to dismiss the indictment, which the court denied on October 30 after a hearing, would ordinarily have been sufficient to preserve the speedy trial question for appellate review. However, when he pleaded guilty on December 12, he waived as a matter of law his right to a speedy trial. He cannot reassert it in any fashion as long as that plea remains in effect. Nor can he successfully launch a collateral attack on his conviction, whether by habeas corpus, 28 U.S.C. § 2255, or *coram nobis*. There are no exceptional circumstances in the case at bar to warrant any relaxation of the general rule that lack of a speedy trial can be raised only by direct appeal and is not cognizable as a ground for collateral attack.

ARGUMENT

1. By pleading guilty appellant waived his right to a speedy trial

(P Tr. 1-7, S Tr. 1-9)

The right to a speedy trial is a personal right and is deemed waived unless promptly asserted. *United States* v. *Lustman*, 258 F.2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958); see *Smith* v. *United States*, —— U.S. App. D.C. ——, 331 F.2d 784 (1964); *James* v. *United States*, 104 U.S. App. D.C.

263, 261 F.2d 381 (1958), *cert. denied,* 359 U.S. 930 (1959). The only attempt made by appellant to assert this right was in his *pro se* motion to dismiss the indictment, filed on October 15 and denied after a hearing on October 30. Ordinarily this would be sufficient to preserve the question for appellate review, but in the circumstances of this case it is not.[5] Appellant's guilty plea on December 12, 1963, operated as a waiver of any right to contend here that he was denied a speedy trial.

It must be recognized at the outset that by pleading guilty appellant waived his right to *any* trial, speedy or otherwise. *Kercheval* v. *United States,* 274 U.S. 220 (1927); *Everett* v. *United States,* —— U.S. App. D.C. ——, 336 F.2d 979 (1964); cf. *Edwards* v. *United States,* 103 U.S. App. D.C. 152, 256 F.2d 707, *cert. denied,* 358 U.S. 847 (1958). It is also well established that "a voluntary[6] plea of guilty constitutes an effective and complete waiver of all non-jurisdictional defects which might be otherwise raised by way of defense, appeal or collateral attack." *United States* v. *Hetherington,* 279 F.2d 792, 796 (7th Cir.), *cert. denied,* 364 U.S. 908 (1960); *accord,*

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[5] There is some ambiguity in the record with regard to appellant's motion. Notwithstanding its denial on October 30, both the docket and the jacket entry for December 12, 1963, indicate that appellant's motion to dismiss the indictment was withdrawn at the time the plea was entered. See P Tr. 7.

[6] Appellant does not assert and has never asserted that his plea was not voluntary. The record clearly shows that the plea was voluntarily and understandingly made. See P Tr. 3-5, S Tr. 4-6.

United States v. *Sturm*, 180 F.2d 413 (7th Cir.), *cert. denied,* 339 U.S. 986 (1950). Thus such a plea has been held to operate as a waiver of the right to a jury trial,[7] a waiver of an illegal search and seizure[8] or of any issue of entrapment,[9] a waiver of the statute of limitations,[10] and a waiver of any claim that punishment should be assessed under a different statute from that actually applied by the court.[11]

The right to a speedy trial is not jurisdictional. *Levine* v. *United States,* 182 F.2d 556 (8th Cir. 1950), *cert. denied,* 340 U.S. 921 (1951); cf. *Earnest* v. *United States,* 198 F.2d 561 (6th Cir. 1952) (guilty plea in different state and district under Rule 20, F.R. Crim. P., held to be a waiver of Sixth Amendment right to trial in "the State and district wherein the crime shall have been committed"). It thus can be waived either by the affirmative act of the accused or by his failure to raise the issue in timely fashion. *Rindgo* v. *United States,* No. 18498, decided September 24, 1964; *Smith* v. *United States, supra* at 787; *United States* v. *Lustman, supra.* A guilty plea constitutes just such an affirmative act. When

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[7] *Donnelly* v. *United States,* 185 F.2d 559 (10th Cir. 1950), *cert. denied,* 340 U.S. 949 (1951).

[8] *Thomas* v. *United States,* 290 F.2d 696 (9th Cir. 1961), *motion for leave to file petition for cert. denied,* 368 U.S. 964 (1962).

[9] *Ruiz* v. *United States,* 328 F.2d 56 (9th Cir. 1964).

[10] *United States* v. *Parrino,* 212 F.2d 919 (2d. Cir.), *cert. denied,* 348 U.S. 840 (1954).

[11] *Murray* v. *United States,* 217 F.2d 583 (9th Cir. 1954).

appellant chose on December 12 to change his plea from not guilty to guilty, he waived *as a matter of law* his right to a speedy trial. *Pate* v. *United States*, 297 F.2d 166 (8th Cir.), *cert. denied*, 370 U.S. 928 (1962).[12] He could not thereafter reassert it without first withdrawing his plea, which he has never sought leave to do.[13] As long as his plea stands, it remains a bar to any claim that he was denied his right to a speedy trial.[14]

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[12] *Pate* appears to be the only federal case on this point. Some state cases, all holding that the right to a speedy trial is waived by a plea of guilty, are collected at Annot., 57 A.L.R.2d 302, 343-344 (1956). *People* v. *Chirieleison*, 3 N.Y. 2d 170, 143 N.E.2d 914 (1957), relied on by appellant, is there distinguished on its facts.

Appellant seeks to downgrade *Pate* by emphasizing the fact that the defendant in that case did not assert his right to a speedy trial at the time he entered his plea of guilty. But in *Jordan* v. *United States District Court*, 98 U.S. App. D.C. 160, 233 F.2d 362, *vacated on other grounds sub nom. Jordan* v. *United States*, 352 U.S. 904 (1956), this Court indicated that even though Jordan preserved his claim of lack of a speedy trial by means of appropriate pre-trial motions and pleadings, he in effect waived it when he finally went to trial without renewing the point or making objection *at that time*. If *Pate* is to be thus distinguished, then *Jordan* should apply here.

[13] It cannot now be withdrawn except on a showing of manifest injustice, which under the circumstances is impossible. Rule 32(d), F.R. Crim. P.; cf. *Everett* v. *United States*, *supra*. Appellant has twice admitted his guilt in open court, claiming only dubious mitigating circumstances at the time of sentencing (S Tr. 3-6). Where is the manifest injustice? Appellees submit there is none.

[14] Even on the merits (and appellees submit that the merits are beyond consideration) appellees must prevail. Although an affirmative showing of prejudice may perhaps be unneces-

2. Lack of a speedy trial is not a valid ground for collateral attack

Appellant concedes at pages 28-29 of his brief that the provisions of 28 U.S.C. § 2255 preclude him from attacking his conviction collaterally by way of habeas corpus. See *United States* v. *Hayman*, 342 U.S. 205 (1952); *Smith* v. *Reid*, 89 U.S. App. D.C. 272, 191 F.2d 491 (1951). Even if this were not so, the contention he makes would not be sufficient basis for collateral attack in any form. Denial of the right to a speedy trial, even though it is a constitutional right, must be remedied on direct appeal; it is not cognizable as a ground for collateral attack. *Jordan* v. *United States District Court, supra*; *Harris* v. *Swenson*, 199 F.2d 269 (4th Cir. 1952); *Ruben* v. *Welch*, 159 F.2d 493 (4th Cir.), *cert. denied*, 331 U.S. 814 (1947). This Court did indicate in *Jordan* that "perhaps in an extreme case delay in bringing a prisoner to trial is subject to collateral attack." 98 U.S. App. D.C. at 167, 233 F.2d at 369. Extreme cases permit the courts to make exceptions; see *Fay* v. *Noia*, 372 U.S. 391 (1963); *Sunal* v. *Large*, 332 U.S. 174, 179-180 (1947). But in the absence of exceptional circumstances even a constitutional violation can ordinarily be remedied only by direct appeal. *Smith* v. *United*

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sary when an accused asserts that he has been denied his constitutional right to a speedy trial (see *United States* v. *Lustman*, *supra*), at least there must be some prejudice apparent on the face of the record before "the balance between the rights of public justice and those of the accused," of which this Court spoke in *Smith* v. *United States*, *supra* at 787, is tipped in favor of the latter. The record in this case reveals not the slightest hint of prejudice.

States, 88 U.S. App. D.C. 80, 187 F.2d 192 (1950), *cert. denied*, 341 U.S. 927 (1951). There are no exceptional circumstances in the case at bar. Appellant's election by pleading guilty to forego available defenses, including the claimed denial of his right to a speedy trial, precludes collateral attack. *Watts* v. *United States*, 107 U.S. App. D.C. 367, 278 F.2d 247 (1960); *Edwards* v. *United States*, *supra*. Appellee submits, therefore, that leave to appeal from the dismissal of appellant's petition for a writ of habeas corpus was improvidently granted.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court in Criminal No. 326-63 should be affirmed and the appeal from the judgment in Habeas Corpus No. 83-64 dismissed as improvidently granted, or in the alternative that the judgments of the District Court in both cases should be affirmed.

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REPLY BRIEF FOR APPELLANT

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18708

ROBERT F. BELL,

Appellant,

v.

SAM A. ANDERSON, Superintendent,
D.C. Jail, and

UNITED STATES OF AMERICA,

Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA AND AN ORDER OF THAT COURT DENYING A PETITION FOR WRIT OF HABEAS CORPUS

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 12 1965

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Appointed by this Court

AS TO QUESTIONS PRESENTED

In the opinion of the Appellant the basic question here presented is as set forth in the Brief for Appellant. Question No. 1, as stated in the Brief for Appellees, is a re-statement of that part of the question as stated in the Brief for Appellant that his position, that the indictment should have been dismissed due to denial of a speedy trial, was not waived in the circumstances of this case by the plea of guilty to the lesser included offense of attempted robbery.

In The

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18708

ROBERT F. BELL,

Appellant

v.

SAM A. ANDERSON, Superintendent,
D.C. Jail, and

UNITED STATES OF AMERICA

Appellees

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA AND AN ORDER OF THAT
COURT DENYING A PETITION FOR WRIT OF HABEAS CORPUS

REPLY BRIEF FOR APPELLANT

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AS TO THE APPELLANT'S STATEMENT, AND THE APPELLEES' COUNTERSTATEMENT, OF THE CASE

It is not believed that there is any inaccuracy or omission in the statement of the case in the Brief for Appellant (Rule 17(c)(3) of the Rules of this Court).

Footnote No. 2 of the Brief for Appellees (p.2) refers to Footnote No. 5 thereof (p. 6) in which entries in the docket and the jacket for December 12, 1963, are mentioned that indicate that the Appellant's motion to dismiss the indictment was withdrawn at the time the plea was entered. Such motion was not withdrawn, as shown by the transcript of December 12, 1963, cited by such Brief (P. Tr. 7), which shows clearly that only "motions pending" were disposed of. That is confirmed by the official memorandum (not cited by the Appellees) filed

in Criminal Case No. 326-63 and signed by the Clerk of the District Court by direction of Presiding Judge McGuire, which official memorandum, headed "Withdrawal of Plea" states "Pending motions as to each defendant are withdrawn by counsel" (Emphasis added). The Brief for the Appellees recognizes in footnote 2 (p. 2) that the motion *pro se* of the Appellant to dismiss the indictment for lack of a speedy trial was denied after hearing on October 30, 1963, and so was not pending on December 12, 1963. A mistake in the making of docket and jacket entries does not, it is submitted, create any ambiguity in the light of the foregoing.

Also, the Brief for the Appellees states (p. 3) that "Bell [the Appellant] did not note an appeal from his conviction." That statement gives an incorrect impression of this case, even though such Brief goes on with a statement of procedural steps ending with the quotation from the order of this Court herein of October 30, 1964,

> "that appellant's aforesaid petition for writ of habeas corpus shall be treated as a

> notice of appeal and that this appeal shall be considered as an appeal from the order denying appellant's petition for writ of habeas corpus and as a direct appeal from Criminal Case No. 326-63."

This case is now before this Court on direct appeal, as Counsel for the Appellees agreed (Reply of October 7, 1964, to Motion forRemand with Directions), on the basis, recognized by this Court, that the Appellant noted an appeal in due time.

The additional statements of fact made in the counterstatement of the case in the Brief for the Appellees and not included in the statement of the case in the Brief for Appellant are not "material to the consideration of the questions presented" (Rule 17 (b)(5) of the Rules of this Court).

ARGUMENT IN REPLY

THE PLEA OF GUILTY DID NOT WAIVE THE APPELLANT'S RIGHT TO HIS FREEDOM FOR DENIAL OF A SPEEDY TRIAL

A. The Appellant Raised the Issue of Speedy Trial in Due Time and did not Affirmatively Waive His Right Thereto.

The Brief for the Appellees is based on the

assumption that by operation of law the Appellant waived his right to a speedy trial when he entered his plea of guilty. Such Brief seems to recognize that, if the entry of such plea in the circumstances of this case did not waive the position of the Appellant that he should be granted his freedom for denial of a speedy trial, the lapse of time which occurred in this case of 268 days after arrest, 248 days after indictment and 198 days after the date first set for trial constitutes denial of a speedy trial.*

Such Brief says (p. 6) with reference to the motion of the Appellant for dismissal of the indictment for denial of speedy trial that "Ordinarily this would be sufficient to preserve the question for appellate review, but in the circumstances of this case it is not"; and asserts (p. 7) that the right to speedy trial "can be waived either by the affirmative act of the accused or by his failure to raise the issue in timely fashion". It is the position of the Appellant that he did raise

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*The guilt or innocence of the accused and whether or not an accused has or has not admitted guilt -- matters referred to in the statement of Questions Presented and elsewhere in the Brief for Appellees -- are irrelevant to the question of whether an accused was denied the right to a speedy trial.

the issue in timely fashion by such motion, and that he did not by any affirmative act waive his right to a speedy trial -- that the plea of guilty in the circumstances of this case did not constitute such an affirmative act. The position of the Appellant in that regard is set forth in Point II of the Argument in the Brief for Appellant (pp. 20-27).

B. The Jordan Case is Inapplicable, as is the Pate Case.

Appellant, of course, does not seek to downgrade the Pate case* (see Appellees Brief, Footnote 12, p. 8). The Appellant emphasizes that that case is not controlling here because Appellant therein "chose to enter his plea of guilty without making assertion of" the right to a speedy trial. Here the Appellant had already asserted his right to a speedy trial. The Brief for Appellees goes on in such Footnote 12 to say, in effect, that, if Pate is thus distinguished, then

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*Pate v. United States, (8th Cir. 1961) 297 F2d 166, cert. den. 370 U.S. 928 (1962).

the Jordan case*, decided by this Court, should apply here. The Brief for Appellees overlooks the fact that the Jordan case was before this Court in a very different posture as to speedy trial than is this case. In the Jordan case the speedy trial question was raised on collateral attack, and the Court only dealt, as to speedy trial, with the question whether the point could be raised collaterally. The position urged in such Footnote 12 to the Brief for Appellees on the basis of the Jordan case relates to a footnote explaining the procedural statement in the opinion that "If the point had been made on direct attack a different question would have been presented[12/]". The Court said in such footnote that assuming certain allegations of the Appellant to be correct, and assuming arguendo that his right to a speedy trial had not been waived at the time the trial began he, nevertheless, had not raised it "either during the trial or on the subsequent appeal". It is not believed that constitutes a holding by this Court in a situation such as is presented on this appeal, which is a direct appeal in a case in which the speedy trial issue was

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*Jordan v. United States District Court for the Dist. of Col. (1956) 98 App. D.C. 160, 233 F2d 362, rev'd on other grounds, 352 U.S. 942.

raised, whereas in the Jordan case this Court only decided the question whether this point could be raised on collateral attack, and by holding that it could not, did not deal with the question of denial of speedy trial.

It is true that in this case the speedy trial point was not raised at the time the plea was entered on December 12, 1963. Indeed, the point was then ignored. But the issue had already been raised in this case by the *pro se* motion of the Appellant; and for the reasons stated in Point II of the Argument in the Brief for Appellant (pp. 25-26), the circumstances of this case as a whole show that the Appellant did not intend to waive his position that the indictment should be dismissed for denial of a speedy trial.

The Appellant, being an untutored, indigent defendant, could not be expected himself to raise the point; and, if it should have been raised again, an administrative practice of the District Court should have brought to the attention of Judge McGuire at the time the plea was entered the fact that the Appellant had raised the question of denial of his right to a speedy trial. It is submitted that the fact that did not occur does not

preclude this Court on this direct appeal from deciding the question of whether there was a denial of that right*.

C. The Conclusions reached in the Chirieleison Case should be Applied to this Case -- a Plea of Guilty Does not Automatically Waive the Right to Speedy Trial.

The Appellant's position continues to be that this case is quite similar to People v. Chirieleison, (N.Y. Ct. of App., 1957) 3 NY2d 170, 143 NE2d 914, and that the conclusions reached in the decision of the New York Court of Appeals in that case should be applied to this case. The Brief for Appellees in Footnote 12 (p. 8) says that the Chirieleison case is distinguished on its facts in the annotation at 57 A.L.R.2d 302, 343-344 (1956) -- but the distinction stated by the annotation is between the Chirieleison case and other cases in the annotation, not between the Chirieleison case and this case. It should be recognized that whether the right to speedy trial is waived by entry of a plea of guilty is not a result which automatically comes about "by operation of law" as the Brief for Appellees assumes, but is dependent on the facts and has, therefore, resulted in differing decisions. As stated in 22A C.J.S., Criminal

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*The denial of the Appellant's motion to dismiss for lack of speedy trial was a non-appealable interlocutory order. 28 U.S.C. §1291; Atlantic Fishermen's Union v. United States (1st Cir. 1952) 197 F2d 519; Conway v. United States (9th Cir. 1944)142 F2d 202; see also Blount v. Huff (1944) 79 App.D.C. 204, 144 F2d 21.

Law, §477, P. 71:

> "According to some authority the entry of a plea of guilty constitutes a waiver of the right to discharge for failure to try accused within the time prescribed by law, and cures any error resulting from denial of his motion for a discharge, but it has also been held that a plea of guilty made after improper denial of a motion to dismiss for failure to bring accused to trial within the time required does not constitute a waiver of his right to a speedy trial."

D. Because of Error Below in Not Affording the Appellant a Speedy Trial the Judgment and Plea Should Be Vacated and the Remaining Portion of the Indictment Dismissed, and the Appellant Granted His Freedom.

The Brief for Appellees takes the position (Footnote 13, P. 8) in reliance on Rule 32(d) of the Federal Rules of Criminal Procedure that the plea of guilty cannot be withdrawn under that Rule and that, therefore, this Court cannot sustain the Appellant's right to his freedom for denial of his right to speedy trial. The Appellant does not rely on Rule 32(d), but says in this direct appeal that it was error in the Court below that the indictment was not dismissed for lack of speedy trial -- see Point 1 of Statement of Points in the Brief for Appellant.

The question is not "Where is the manifest injustice?" from the point of view of Rule 32(d) of the Federal Rules

of Criminal Procedure. The point is that it is manifestly unjust to deny an accused a speedy trial and cause him to suffer the prejudice (see Footnote 14, pp. 8-9 of the Brief for Appellees) of remaining in jail over a long period of time and then impose upon him a waiver of his right to freedom because of denial of a speedy trial in circumstances such as are here presented, where a plea of guilty to a lesser included offense is accepted on the proposal of the Prosecutor and a theretofore asserted right to speedy trial by an untutored indigent is ignored.

It is submitted that protection and upholding of the effectiveness of the ancient and constitutionally guaranteed right to a speedy trial against the possibility of its frustration by delays over which the accused has no control is more important than the public interest in punishing an accused who pleads guilty in circumstances such as those presented in this case, where, by the time the Appellant came to trial, he had suffered long delay and incarcertaiton, and was faced with the alternative of standing trial with a possible maximum penalty of at

least 31 years of imprisonment or pleading guilty with a maximum penalty of 3 years imprisonment.

Dated: January 12, 1965.

Respectfully submitted

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Certificate as to Service

I hereby certify that I served a copy of the foregoing Reply Brief for Appellant in No. 18708 upon the United States Attorney for the District of Columbia by mailing such copy to him this 12th day of January, 1965, addressed as follows:

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